No. 83-751

In the Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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A. 1. Respondents base their arguments heavily on this Court's decisions in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), and *Donaldson* v. *United States*, 400 U.S. 517 (1971), which recognize that under certain circumstances a person with an interest in documents summoned or subpoenaed from a third party may seek permissive intervention in proceedings brought to obtain enforcement of the summons or subpoena. Respondents argue (see O'Brien Br. 16-17) that "[u]nder *Reisman* the target of an SEC investigation has a right to challenge a subpoena to a third party on any appropriate ground";

that "[s]uch appropriate grounds include the SEC's failure to meet the *Powell* standards of governmental good faith"; and that "[i]f the target has no notice of the third-party subpoena, then the *Reisman* decision is a nullity" because the "target" has no opportunity to challenge the subpoena. See also Magnuson Br. 20-28. Respondents then contend that the court of appeals in this case merely created a procedural mechanism to protect a "target's" opportunity to seek permissive intervention. See Magnuson Br. 27; O'Brien Br. 19.

Even if respondents' interpretation of *Reisman*, *Powell*, and *Donaldson* were correct, it would not follow that the court of appeals' notice requirement is justified. Respondents cite no authority and we are aware of none holding that potential permissive intervenors in civil litigation must be given notice of pending or potential litigation. In addition, for all the reasons set forth in our opening brief, we think that judicial creation of such a procedural requirement in the present context would be contrary to Congress's intent, as expressed in the legislation governing SEC investigations and subpoenas. See Govt. Br. 16-23.

2. In any event, respondents have read far too much into the cases upon which they rely. Those cases do not by any means establish that it is appropriate for a "target" asserting *Powell* claims to intervene in a summons or subpoena enforcement proceeding. First, respondents, like the court of appeals (see Pet. App. 6a), erroneously construe *Powell* to mean that "targets" of an investigation "have a right to be investigated consistently with the *Powell* standards." As we pointed out in our opening brief (at 24), however, *Powell* was exclusively concerned with the rights of a *recipient* of a summons or sub-

poena and said nothing whatsoever about the rights of a "*target*." *Powell* did not recognize a "target's" right to challenge a third-party subpoena or summons any more than the Fourth Amendment grants a "target" the right to challenge the reasonableness of a third-party search that might affect the "target's" interests.

Second, neither *Reisman* nor *Donaldson* held or stated that a "target" may intervene in a summons or subpoena enforcement proceeding to contest whether the *Powell* standards have been met. In *Reisman*, attorneys for taxpayers claimed that a third-party summons threatened to violate their work-product privilege and the taxpayers' rights under the Fourth Amendment.[1] They therefore sought injunctive and declaratory relief against compliance. Affirming the dismissal of their suit, this Court held that the taxpayers had an adequate remedy at law since they could seek to intervene in any enforcement proceeding in order "to protect their interests" (375 U.S. at 449) or to assert "their constitutional or other claims" (*id.* at 445).[2] However, *Reisman* did not explain in any greater detail what "interests" or "claims" would justify intervention. *Reisman* thus

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[1] Under more recent cases, it seems clear that the taxpayers had no protectable Fourth Amendment interest in the records summoned from their accountants. *United States* v. *Payner*, 447 U.S. 727, 731-732, 735 (1980); *United States* v. *Miller*, 425 U.S. 435, 443 (1976). See also *Rakas* v. *Illinois*, 439 U.S. 128, 133-138 (1978) (rejecting theory of Fourth Amendment "target" standing).

[2] The Court also stated (375 U.S. at 450) that the taxpayers could seek to enjoin voluntary compliance with the subpoena, thereby compelling the initiation of an enforcement proceeding in which they could attempt to intervene.

provides no support for respondents' assumption that a third party's interest "in being investigated consistently with *Powell*," independent of any interest in the documents being subpoenaed, would suffice.

Donaldson, the other case upon which respondents' argument rests, likewise did not hold that a "target's" interest in being investigated consistently with *Powell* provides a proper basis for intervening in a summons or subpoena enforcement proceeding. In *Donaldson* a taxpayer who claimed that a third-party summons had been issued solely for the improper purpose of gathering evidence for use in a criminal prosecution of him was denied intervention in the summons enforcement proceeding.[3] This Court affirmed, holding that intervention under *Reisman* "is permissive only and is not mandatory" (400 U.S. at 529) and that "the taxpayer's interest [was] not enough and [was] not of sufficient magnitude * * * to conclude that he is to be allowed to intervene" (*id.* at 531). Obviously this holding lends no support to respondents' arguments here.

3. Whether and if so under what circumstances it might be appropriate for a district court to permit intervention by a "target" asserting *Powell* claims are unsettled questions that the Court need not de-

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[3] O'Brien's contention (Br. 12-13) that Donaldson was asserting a *Powell* claim is strained. In *Donaldson* the taxpayer sought intervention by claiming that the summons had been issued for an improper criminal investigatory purpose (*id.* at 521); he did not invoke *Powell*. If the Court understood him to be asserting a *Powell* claim, it apparently felt that such a claim carried little force, since the Court described Donaldson's interest in the enforcement proceeding as "nothing more than a desire * * * to counter and overcome [the recipients'] willingness, under summons, to comply and produce records" (*id.* at 531).

cide in this case. In order to be eligible for permissive intervention, the "target" would have to show that his "claim or defense and the main action have a question of law or fact in common" (Fed. R. Civ. P. 24(b)(2)). Neither the court of appeals nor respondents have made any effort to show how a "target" asserting *Powell* claims could satisfy that standard, and it is not clear that it could be met.

Even if a "target" could establish eligibility for permissive intervention, a district court would appear to have strong reasons for denying his request in virtually every case in which, as here, the proposed intervenor alleges no interest in the documents. "In exercising its discretion the court [must] consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" (Fed. R. Civ. P. 24(b)). Accordingly, the need to prevent delay of agency investigations would counsel against discretionary intervention in most subpoena enforcement proceedings. See *Hannah* v. *Larche*, 363 U.S. 420, 443 (1960). Moreover, it is not apparent why a "target" should be permitted to intervene to contest compliance with *Powell*, rather than making such claims if and when he is served with a subpoena. If a "target" has not been served with a subpoena, his claim would appear to be "too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene" (*Sutphen Estates* v. *United States*, 342 U.S. 19, 23 (1951)). On the other hand, if he has been served, there is little reason to allow intervention for the purpose of litigating claims that "can properly be adjudicated elsewhere" (*ibid.*).

In sum, the best that a "target" wishing to present *Powell* claims can assert is that if he had notice of

third-party subpoenas he *might* be eligible for permissive intervention in enforcement proceedings and *might* be able to persuade the trial court that the balance of equities in a particular case favored intervention. Such speculative possibilities are a far cry from a general "right to be investigated consistently with the *Powell* standards" (Pet. App. 6a) and provide an insufficient basis for burdening the Securities and Exchange Commission and like agencies with the obligation to provide "targets" with notice of all third-party subpoenas.

B. 1. In their briefs in this Court, respondents have abandoned the decision of the court of appeals, which held that the Commission must give "targets" notice of subpoenas issued to third parties "[a]bsent special circumstances involving a serious threat to the integrity of the investigation" (Pet. App. 8a). Instead, respondents now argue that requiring notice of third-party subpoenas was justified in this case due to respondents' particular allegations of agency abuse. Magnuson Br. 15-17, 27; O'Brien Br. 9, 26, 28-29. See also Wedbush Am. Br. 25-28. Magnuson asserts (Br. 17):

> In this case, where the targets have alleged and have made a showing of abuses that if proven would warrant denial of subpoenas at enforcement proceedings, the Ninth Circuit correctly held that notice is required to assure that those proceedings will afford an adequate remedy.

O'Brien goes further and constructs (Br. 30-31) an elaborate procedure for determining whether notice should be ordered.[4]

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[4] O'Brien states (Br. 30-31):

> The target's application [for notice] must specifically allege appropriate grounds for challenge to third-party

Respondents' refusal to defend the court of appeals' broad holding is understandable, but their narrower arguments simply will not support the judgment below. There is not one word in the court of appeals' opinion to suggest that the court's decision was based on respondents' factual allegations. On the contrary, the court stated flatly (Pet. App. 1a) that the case "present[ed] only questions of law." In addition, since respondents and their amicus Wedbush have devoted so much space to allegations of SEC abuse, it bears emphasis that the Commission vigorously contests their charges and that none of those allegations has been accepted by any court, including the court of appeals. Obviously, then, those charges cannot be used to prop up the court of appeals' decision.

2. Even if the court of appeals had adopted the position that respondents now advance, its decision would still be indefensible. Such a holding would be equally devoid of constitutional and statutory support and equally inconsistent with the laws governing SEC investigations. And the practical consequences of respondents' arguments would be just as unac-

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subpoenas. The SEC may answer with an affidavit showing *prima facie* that its conduct meets *Powell* standards. If such showing is not made, or if the target produces by affidavit some evidence sufficient to infer a possibility of SEC misconduct affecting the enforceability of third-party subpoenas, then the court would order notice of third-party subpoenas.

On a target's application for notice, even if the target meets the foregoing conditions, the Court in balancing the equities may nevertheless refuse to order notice if it finds a likelihood that the target would use notice of third-party subpoenas to destroy documents, intimidate witnesses, or otherwise obstruct the investigation.

ceptable. Allegations of agency misconduct are easy to make. A rule requiring that notice be given to any "target" who makes such charges would be no better than the court of appeals' blanket notice requirement, since virtually any person whose conduct is subject to a Commission investigation "could make the claim[s] that [respondents] ha[ve] made" here. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 243 (1980). Moreover, forcing the Commission to litigate such charges, as O'Brien's procedure would require, would divert the Commission's resources and disrupt its investigations. See *Hannah* v. *Larche*, 363 U.S. at 443.

Finally, loose references to the court of appeals' "equitable powers" and its power to prevent abuse of judicial process also cannot support the judgment below. (And again, the court of appeals did not rest its decision on either of those bases.) Respondents have not shown that any constitutional or statutory provision requires the Commission to provide notice of third-party subpoenas, and in the absence of any proven violations "equity" surely does not authorize a court to manufacture novel procedural requirements and impose them upon an independent regulatory agency. Likewise, a court's authority with respect to its own process cannot justify the judgment below, which requires the SEC to provide "targets" with notice of third-party subpoenas even when judicial process has not been sought.

This Court just recently reiterated the principle that courts should not restrict federal agencies' investigative powers "absent unambiguous directions from Congress." *United States* v. *Arthur Young & Co.*, No. 82-687 (Mar. 21, 1984), slip op. 10. The Court stated (*ibid.*) that "[i]f the broad latitude granted to [an agency] is to be circumscribed, that

is a choice for Congress, and not this Court, to make." The Court rejected (*id.* at 13) the notion, embraced by the court of appeals (Pet. App. 7a), that "fundamental fairness" may limit an agency's investigative powers. It emphasized that courts are not free to fashion remedies based on their own balancing of competing public policies (*Arthur Young & Co.*, slip op. 14-15). Instead, the Court said, "[t]his kind of policy choice is best left to the Legislative Branch." *Id.* at 15.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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